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IN THE

# Supreme Court of the United States

October Term, 1947.
No. 771

GLENS FALLS INDEMNITY COMPANY, a corporation,
*Petitioner,*

*vs.*

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Supreme Court of the United States:*

In reply to the Petition for Writ of Certiorari filed by above named petitioner, your respondent herewith presents its brief in opposition thereto.

### Statement of Jurisdiction.

Petitioner's jurisdictional statement sets forth the basis upon which it invokes this court to grant a writ of certiorari. It is invoked upon the ground set forth in Rule 38, subdivision 5 (b) of this court, in that the Circuit Court of Appeals for the Ninth Circuit "has decided an important question of local law in a way probably in conflict with applicable local decisions." (Petition, p. 5.)

### Statement of Facts.

The opinion of the Circuit Court of Appeals for the Ninth Circuit [R. 886-893] correctly states the essential facts as may be necessary for the herein brief without any further statement.

## ARGUMENT.

### I.

### Answer to Petitioner's First Contention That "the Circuit Court of Appeals for the Ninth Circuit Has Failed to Recognize and Follow the Law of the State of California, as Provided by Statute and as Enunciated by the Highest Court of That State, Relating to the Doctrine of Strictissimi Juris or Strict Construction of Surety Contracts."

The law of California relating to the doctrine of *strictissimi juris,* as applied to the interpretation of surety contracts, is clearly stated in the case of *Ryan v. Shannahan,* 209 Cal. 98, 101, as follows:

> "We, of course, recognize the well-settled principle that the liability of a surety is measured and bounded by the express terms of its contract and that courts are not swift to extend that liability by construction (*County of Glenn v. Jones,* 146 Cal. 518 (80 Pac. 695); Civ. Code, sec. 2836; 23 Cal. Jur., p. 1024; section 24, and cases there cited), yet we see no escape from the conclusion that, irrespective of the fact that the word 'in' might in some instances be subject to the interpretation which appellant would have us place upon it, the claims presented by plaintiff here are amply covered by the language of said bond, which is to be considered in the light of the contract it secures. In the last analysis the extent of a surety's liability is measured by the language used to express it, when read in the light of the circumstances attending the transaction. The following language found in the recent case of *Roberts v. Security Trust etc. Bank,* 196 Cal. 557 (238 Pac. 673, 677), is applicable here, even though in that case the contract was

expressly incorporated by reference as a part of the bond, instead of merely being attached to it:

'Our Civil Code (sec. 2837) provides that, in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. In *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 730 (72 Pac. 352, 354), this court said: "While it is true that a surety cannot be held beyond the express terms of his contract, yet in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the contract that it will not reasonably bear but it means that the contract shall be fairly construed with a view to effect the object for which it was given and to accomplish the purpose for which it was designed. The old rule of *strictissimi juris* applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall not be reasonably interpreted as other contracts are."'

"In the case of *W. P. Fuller & Co. v. Alturas S. Dist.*, 28 Cal. App. 609, 612, 613 (153 Pac. 743, 745), the doctrine is set forth in this language: 'It is elementary that "sureties are never bound beyond the strict letter of their contract; that they have the right to stand upon the precise terms of their agreement, and that there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves." (*Callan v. Empire Surety Co.*, 20 Cal. App. 483, 485 (129 Pac. 978, 981).) But it is also elementary that a bond

given to guarantee the execution of a contract according to its terms becomes a part of such contract, and to that contract the sureties become parties the same as though they had actually made and executed the contract itself. Therefore, in interpreting the language of the undertaking for the purpose of gathering its scope or the measure of the liability of the sureties, we must do so by treating or viewing the contract and the undertaking as a whole or as constituting an indivisible contract. In other words, we must, in order to ascertain the nature and extent of the liability to which the sureties have bound themselves, examine the undertaking by the light of the agreement of whose terms it guarantees the faithful performance.'"

The language contained in the judgment of the Circuit Court of Appeals which petitioner contends is an important question of local law decided in a way probably in conflict with applicable local decisions is as follows:

> *"We perceive no obligation on the part of appellee to serve notice on appellant of any default on the part of Duque & Frazzini until failure to supply needed material occurred."* (Petition, p. 16.)

Petitioner selected one isolated sentence which in no manner attempted to state a principle of law but merely to state the obligation on the part of appellee as derived from a review of the evidence.

Duque & Frazzini were subcontractors over whom respondent could exercise no control. All respondent was concerned about was that sufficient material should be available to carry on its operation.

The Circuit Court correctly stated, based on the evidence, that *"the contract does not specify the nature of the work that was to be commenced on February 19. The evidence discloses that installation work commenced February 11th and production February 25th. As to erection of plants having a capacity of 800 yards, the contract does not specify the date of which such plants were to be completed. It would have been impossible to complete them until sometime after February 19th. Material was being prepared sufficient for the use of appellee; in fact some material was stockpiled for some weeks and no failure to supply on the part of Duque & Frazzini occurred until sometime in April."* (Italics ours.) [R. 890.] Then follows the above sentence questioned by petitioner "as probably in conflict with applicable local decisions."

As above stated, the Circuit Court, in so expressing itself, merely drew its inference from the evidence as to what was or was not the obligation of respondent to serve notice on petitioner of any default on the part of Duque & Frazzini rather than to decide an important question of local law.

Petitioner, on page 19 of its petition, states that "by failing to give notice promptly, respondent deprived petitioner of a reasonable opportunity to remedy the failure of its principal before the job had deteriorated into a situation from which an economical recovery was impossible."

The evidence establishes and the trial court so found that petitioner was not only fully advised by respondent but also made investigations of all alleged defaults and at no time did it advise respondent that it intended to or would disavow any liability under said subcontract bond. [R. 192-210.]

In *Christie v. Commercial Casualty Co.*, 6 Cal. App. (2d) 710, 719, the court said:

> "It is the established rule of law that when a surety on a bond claims that he be released from the obligation thereon because of an alteration of the instrument or on account of changed relationship of the claimant for wages, he must disavow his liability promptly or within a reasonable time after learning of the alteration or the surety will be bound by the bond in spite of the changed instrument or altered condition."

## II.

**Answer to Petitioner's Contention That "the Decision of the Circuit Court of Appeals for the Ninth Circuit Rests Upon Statements of That Court and Findings of Fact by the District Court Which Are Wholly Unsupported by the Evidence."** (Petition, p. 21.)

**A. Contention That Judgment Is Unsustainable Because It Exceeds in Amount Both the Prayer of the Complaint and the Bill of Particulars Should Be Disregarded for the Following Reasons:**

1. Rule 54 (c) of Rules of Civil Procedure for the District Courts of the United States, adopted by this court, provides as follows:

> "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleading."

The judgment herein involved was not entered by default, therefore the court was justified in rendering judgment in an amount in excess of the demand in the complaint.

2. Prior to the trial, petitioner demanded a Bill of Particulars which was, accordingly, filed in said action. [R. 37 to 83, incl., containing Schedules I to XXXXIV, incl., showing in detail the amount of charges against the subcontractors and the amount of credits to which they were entitled.]

Schedule VI of the Bill of Particulars [R. 58-59] was corrected by amendments to the Bill of Particulars showing the amount of charges against the subcontractors for insurance in the amount of $9200.44. [R. 120-121.]

According to Rule 12 (e) of the Rules of Civil Procedure for the District Court of the United States "a bill of particulars becomes a part of the pleading which it supplements."

An addition of all of the charges contained in said Schedules I to XXXVII, inclusive [R. 41 to 78, incl.], subject to the above correction of Schedule VI as shown in the said Amendments to the Bill of Particulars shows a total amount of charges in the sum of $202,366.48. The total amount of credits to which the subcontractors were entitled to as shown in said Schedules XXXVIII to XXXXIV, inclusive [R. 79 to 83, incl.], amounts in the sum of $121,833.95. Deducting the total credits in said amount of $121,833.95 from said total charges in the amount of $202,366.48 leaves a net balance of $80,532.53, instead of the amount of $77,912.85 as stated in appellant's petition on page 23 thereof. This amount of $80,532.53 is in excess of the amount of the judgment in the sum of $79,582.91.

Petitioner apparently based the above assertion on figures contained in the summary. [R. 37 to 40.] However, there is an apparent clerical error in the summary in that Schedules I and VI are in the same amount, instead of Schedule VI showing the correct amount of $9200.44 as shown in said Amendments to the Bill of Particulars. [R. 120-121.] Another apparent error is in the addition of the total charges as indicated in said Summary. [R. 40.]

At the trial of said action, there were certain small amounts contained in the Bill of Particulars which respondent requested eliminated, principally because of duplication and which, at said time, were so eliminated. [R. 314 to 317, incl.]

The trial court, accordingly, found that the items making up the total amount of the principal amount of the judgment were fully, correctly and specifically set forth in said Bill of Particulars and said Amendments thereto as corrected [R. 201 to 205, Findings XVII to XXI, incl.], and ordered judgment entered accordingly.

Interest allowed in the judgment over the amount of the principal was in pursuant to the demand contained in the complaint.

3. Although petitioner filed a list of objections to the Bill of Particulars, it did not offer a scintilla of evidence to disprove any item therein contained or the reasonableness thereof. In fact, during the trial, after respondent produced in court eight boxes of records, counsel for petitioner made the following admission in open court:

> "May it please the court, to clarify the position of the defendant and possibly save time, it is not our position that the payments alleged here were not

made. It is only our position that the defendant is not liable for the amounts paid for various reasons which we have shown or can show. We admit they made the payments, but, because they were premature and for other reasons the defendant is not liable." [R. 405.]

In the case of *Meiser v. McIntosh,* 205 Cal. 11, cited by petitioner, the court, on page 14, said:

> "Where a case is tried upon the theory that the pleadings are sufficient to raise certain issues included in the findings, the parties thereto are estopped from thereafter raising the objection that the pleadings do not support the findings (*Silvers v. Grossman,* 183 Cal. 696 (192 Pac. 534); *Cross v. Bouck,* 175 Cal. 253 (165 Pac. 702).)"

5. The Circuit court was not presented with the alleged error as a direct issue. The matter was merely referred to as a basis for the contention that interest should not be allowed prior to judgment. [R. 215 to 221, incl.]

**B. Answer to Contention Judgment Erroneously Assesses Interest Prior to Judgment.**

The Circuit Court of Appeals correctly stated, in its opinion, that "the principal amount was definite and fixed and consisted merely of charges for such items as labor, materials, etc., in excess of the amount earned by Duque & Frazzini." [R. 893.]

In fact, petitioner at the trial conceded that the payments were so made. [R. 405.]

In the case of *Indemnity Ins. Co. v. Watson,* 128 Cal. App. 10, 21, the court said:

> "The general rule with respect to the allowance of interest is that where there is no contract to pay in-

> terest, the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. (*Gray v. Bekins,* 186 Cal. 617, 623 (279 Pac. 650); 14 Cal. Jur., p. 678.)"

In *Lasky v. American Indemnity Co.,* 102 Cal. App. 192, 198, the court said:

> "Since defendant has utterly failed to print in its brief any portion of the testimony showing that cost of completion was disputed by it at the trial, we may assume as correct plaintiff's assertion in their reply brief that no such dispute occurred and that the case was tried upon the theory that such cost was certain. (*Firpo v. Pacific Mut. Life Ins. Co.,* 80 Cal. App. 122 (251 Pac. 657).)"

Aside from certain corrections made by respondent before the trial commenced as above indicated, the record is devoid of a scintilla of evidence introduced during the trial questioning the payments or reasonableness thereof as shown in said Bill of Particulars, and said amendments thereto as corrected.

The trial court was not called upon to determine any issue in reference to the actual payments made by respondent or the reasonableness or necessity thereof and for that reason the case of *Perry v. Magneson,* 207 Cal. 617, cited by petitioner, is not applicable. It has been specifically pointed out by the court in the case of *Lasky v. American Indemnity Co.,* 102 Cal. App. 192, at page 198, that said case of *Perry v. Magneson "holds that in an action by an owner to recover the cost of completion of building by the contractors, from the surety on a bond to save such owner harmless from loss resulting from a breach of the building contract, interest from the com-*

*mencement of the action should not be allowed where the evidence is conflicting as to such cost and the amount thereof is uncertain till determined by judgment.*" (Italics ours.)

**C. Answer to Contention Decision of the Circuit Court of Appeals for the Ninth Circuit Entirely Depends Upon the Following Statements Which Are Wholly Unsupported. Quoting From the Opinion of the Circuit Court:**

> "Appellee had no knowledge of a default until the material began to run short." (Petition, p. 12.)

It cannot be said that the above statement of the Circuit Court in any manner decides an important question of law either in conflict with applicable local decisions or otherwise. It merely places on this court, in considering the petition, the burden of reviewing the entire evidence to determine the basis for the conclusion of the Circuit Court as above stated.

The same answer may be advanced to petitioner's position in reference to the following statement of the Circuit Court:

> "The contract does not specify the nature of the work that was to commence on February 19." (Petition, p. 26.)

This court is asked to review the evidence in order to construe certain alleged ambiguous provisions in the contract different from the construction placed thereon both by the trial court and the Circuit Court of Appeals.

In the case of *Meyers v. The Texas Co.*, 6 Cal. (2d) 610, 615, the Supreme Court of the State of California stated:

> "Assuming that the lease is ambiguous in this particular, we are not inclined to, and should not, where

a question of facts enters into the construction, depart from the interpretation put upon it by the trial court. (*Adams v. Petroleum Midway Co.*, 205 Cal. 221 (270 Pac. 668); *Whepley Oil Co. v. Associated Oil Co.*, 6 Cal. App. (2d) 94 (44 Pac. (2d) 670); *Kautz v. Zunich General A. & L. Ins. Co.*, 212 Cal. 576 (300 Pac. 34).)"

In *Johnson v. Landucci*, 21 Cal. (2d) 63, 69, the Supreme Court of the State of California said:

> "Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although such other interpretation might, without consideration of evidence, seem equally tenable."

**D. Answer to Contention That "the Findings of the District Court Contain Many Statements of Fact Which Find No Support Whatsoever in the Evidence." (Petition, Page 28.)**

Petitioner has again departed from the original claim that the "Circuit Court has decided an important question of local law in a way probably in conflict with applicable local decisions."

It is true, as stated on page 29 of the petition, respondent's general superintendent was in the pit where the subcontractors were working; however, respondent had two plants of its own operating in the same general locality separate and distinct from the subcontractor's operation and the mere fact that he was present in the general locality does not establish when, if at all, he first learned when the subcontractors commenced production of material. [R. 632, 771 and 772.]

The president of respondent testified that he did not know of his own knowledge the date Duque & Frazzini started on this subcontract work but it was in the records. [R. 569.]

Again he testified that he did not know whether the subcontractors started operating the plant on February 19 or not but respondent had records of the time it took material. [R. 575.]

From the entire evidence of the case there existed sufficient evidence and reasonable inferences therefrom which amply support the findings questioned by appellant in said petition.

Conditions precedent in a bond are not favored by law and are to be strictly construed against on seeking to avail himself of them. (See *Antonelle v. Lumber Co.*, 140 Cal. 309 at p. 315 (73 Pac. 966).)

In the case at bar, the evidence utterly fails to indicate an intention on the part of appellant to avail itself of any alleged violation by respondent of any of the involved conditions precedent, although it was fully advised of all of the facts, until the herein action was instituted in the District Court and thereafter and for the first time appellant directly contended that respondent failed to comply with certain conditions precedent in the bond. As stated by the learned trial judge in the case at bar:

> "In all of their negotiations, the conduct of the surety in dealing with any complaints which came to their attention, even after the abandonment, was such that they lulled the plaintiff into a feeling of security that efforts were being made to adjust the differences and that no affirmative action was forthcoming on the part of the surety." [R. 192.]

## Conclusion.

Respondent submits that the brief of appellant in support of its petition for a writ of certiorari fails, in its entirety, to single out any question of law, whether important or not, in any way probably in conflict with applicable local decisions, and for the reasons herein stated a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit should not issue.

Dated Los Angeles, California, May 5, 1948.

KARL B. RODI,
*Counsel for Respondent.*